Supreme Court of the United States

October Term, 1975

No. 75-1316

IRA L. WHITMAN, Director of Environmental Protection, State of Ohio,

Appellee,

vs.

CITY OF CANTON, OHIO,

Appellant.

ON APPEAL FROM THE SUPREME COURT OF THE STATE OF OHIO

JURISDICTIONAL STATEMENT

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Appellee,

vs.

CITY OF CANTON, OHIO,
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ON APPEAL FROM THE SUPREME COURT
OF THE STATE OF OHIO

JURISDICTIONAL STATEMENT

The Appellant, City of Canton, Ohio, is taking this appeal from the judgment of the Supreme Court of Ohio entered on November 19, 1975, which judgment reversed the prior judgment of the Court of Appeals for Stark County, Ohio, Fifth Appellate District, and ordered the City of Canton, Ohio to bring its water supply system into conformity with the water fluoridation standards set by 6111.13 ORC and to comply with the Orders of the Ohio Director of Environmental Protection and the Ohio Environmental Board of Review requiring the City of Canton to implement such standards. In order to show

that the Supreme Court of the United States has jurisdiction to determine this appeal and that substantial questions are presented, the Appellant, City of Canton, respectfully submits the following statement.

OPINIONS BELOW

The opinion of the Supreme Court of Ohio from which this appeal is taken is recorded in 44 Ohio St. 2d 62, ... N.E.2d ..... (1975). The opinion of the Court of Appeals for Stark County, Ohio—Fifth Appellate District, in Case CA 4116, and the Findings of Fact and Order of the Ohio Environmental Board of Review in the case before that administrative body designated as Case No. EBR 74-30, are unreported and copies of such opinions are set out in the appendix hereto.

JURISDICTION

The action out of which this appeal has arisen was initially brought by the City of Canton as an appeal to the Court of Appeals for Stark County, Ohio from the decision of the Ohio Environmental Board of Review dated September 4, 1974, finding that the City of Canton was not in compliance with the water fluoridation standards set by 6111.13 ORC and ordering the City of Canton to implement such standards. The appeal of the City of Canton from the aforementioned decision of the administrative agency directly challenged the validity and constitutionality of the relevant state statute, being 6111.13 ORC. The Court of Appeals found that the statute in question was not a valid exercise of the police power and reversed the decision of the Ohio Environmental Board of Review.

The Ohio Environmental Board of Review then appealed from the Court of Appeals for Stark County, Ohio to the Ohio Supreme Court which found that Section 6111.13 of the Ohio Revised Code was a reasonable and valid exercise of the general state police power, and accordingly on November 19, 1975, entered final Judgment reversing the Court of Appeals for Stark County and affirming the decision of the Environmental Board of Review. The Appellant, City of Canton, filed its Notice of Appeal to the United States Supreme Court in the Court of Appeals for Stark County, Ohio on January 16, 1975 and in the Ohio Supreme Court on January 20, 1976.

The jurisdiction of this Court to review this case on appeal from the Supreme Court of Ohio rests upon 28 U.S.C. Section 1257(2), inasmuch as this case involves a situation where the validity of a state statute has been drawn into question and the highest court in the state has held it valid.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

This case involves the Fifth, Ninth and Fourteenth Amendments to the Constitution of the United States.

This case also involves Section 6111.13 of the Ohio Revised Code. This statute in its entirety is reproduced and appears in the Appendix to this jurisdictional statement, *infra*, App. p. A48.

QUESTIONS PRESENTED

1. Whether Section 6111.13 ORC is in violation of the substantive due process requirements of the Fifth and

Fourteenth Amendments to the United States Constitution because the mandatory addition of fluoride to public water supply systems as a method of administering fluoride as a dental medication to individuals drinking the water, and not for the purpose of purifying the water or eliminating the presence of disease-spreading bacteria or other harmful elements, is not within the bounds of reasonable and proper exercise of the State police power.

2. Whether Section 6111.13 ORC is in violation of the substantive due process requirements of the Fifth and Fourteenth Amendments of the United States Constitution because the provision of the statute that any municipality or other governmental subdivision may permanently exempt itself from application of the law by voting against fluoridation at a special election held within 120 days of November 17, 1969, is arbitrary, unreasonable and unrelated to the fulfillment of the purposes of the water fluoridation law.

3. Whether Section 6111.13 ORC is in violation of the Equal Protection Clause of the Fourteenth Amendment of the United States Constitution because the provisions of the law which impose water fluoridation upon some governmental subdivisions and not upon others, solely dependent upon whether a special local election was held or not held within 120 days of the effective date of the statute, results in an arbitrary classification of communities which is in no way related to the fulfillment of the fluoridation law, and creates a situation of unequal protection of the rights and freedom of choice of communities and residents of communities who have not held a local election within the arbitrary 120-day period.

4. Whether Section 6111.13 ORC is in violation of the Fourth, Fifth, Ninth and Fourteenth Amendments of the

United States Constitution, because it unreasonably and unnecessarily deprives persons of the fundamental right to personal privacy and to control and regulate the care of their own bodies and the chemicals, drugs, and other substances which they ingest, by mandatorily imposing medicinal fluoride upon persons using public water supply systems in Ohio in an over-inclusive manner, although other reasonable, economical and less inclusive means exist for administering fluoride to those persons who have a need and desire for such medication.

STATEMENT OF THE CASE

The City of Canton is a municipal corporation duly incorporated under the constitution and statutes of the State of Ohio. Said City is located in Stark County, Ohio and has a population in excess of 100,000 residents. The City maintains and operates its own municipal water supply system, which serves not only users within the City but also serves many persons and businesses outside of the City boundaries.

During the year 1969, the Legislature of the State of Ohio enacted Section 6111.13 ORC, requiring that fluoride be added to municipal water supply systems serving more than 5,000 persons. This law further provided that any governmental subdivision could obtain a permanent exemption from the state water fluoridation requirements by voting against fluoridation at a special local election within 120 days of the effective date of the legislation, being November 17, 1969.

The City of Canton has not fluoridated its water to the extent required by the statute, and on July 1, 1974, the Ohio Director of Environmental Protection, being the ad-

ministrative person charged with the enforcement of the law in question, made a finding that the City of Canton was in violation of 6111.13 ORC and ordered compliance. The City of Canton appealed this order to the Ohio Environmental Board of Review, which on September 4, 1974 upheld the Finding and Order of the Director of Environmental Protection. An appeal was then taken by the City of Canton to the Court of Appeals for Stark County, Ohio, and on January 29, 1975 the Appeals Court ruled that 6111.13 ORC was not a valid exercise of the state police powers and reversed the previous decisions and orders of the Director of Environmental Protection and the Ohio Environmental Board of Review.

The Ohio Director of Environmental Protection then appealed to the Supreme Court of Ohio, which on November 19, 1975 ruled that the provisions of 6111.13 ORC were a valid exercise of the general State police power, reversed the ruling of the Court of Appeals for Stark County, and ordered the City of Canton to comply with 6111.13 ORC and the orders of the Director of Environmental Protection. It is from this final judgment of the Supreme Court of Ohio that the City of Canton brings this appeal to the United States Supreme Court.

HOW THE FEDERAL QUESTIONS WERE RAISED

The City of Canton in its Notice of Appeal from the decision of the Ohio Environmental Board of Review to the Court of Appeals for Stark County, specified its grounds or reasons for appeal from that decision. This Notice of Appeal which is included in the certified record of this case, in addition to other grounds, challenged the decision of the Board of Review as being, "unlawful, unreasonable, void, and contrary to the laws and constitution of the State of Ohio and of the United States." (App. A32).

Although the City of Canton in its brief before the Stark County Court of Appeals emphasized as the basis for its appeal the Home Rule provisions of Article XVIII, Section 3 of the Ohio State Constitution, and the exclusive powers of municipalities over local public utilities as set forth in Article XVIII, Section 4 of the Ohio State Constitution, the Court of Appeals based its decision upon other broad federal constitutional principles concerning the reasonableness of the legislation as an exercise of the general state police power. At page 12 of the Opinion of the Court of Appeals, the Court poses the question of whether a law may be a valid exercise of the general State police powers, if it by its own terms provides that any governmental subdivision may elect not to comply with the rule by holding a special election. The Court, in the language of federal due process analysis, succinctly states the pivotal question upon which it decided this case as follows:

> "This case raises the question whether such a law is a police regulation. Is it an exercise of police power to provide that all must comply with the rule, except those who elect not to comply? We hold it is not. If anyone who chooses not to obey need not obey, then that law is not related to public health, safety or welfare." (App. p. A26)

Later, at page 15 of the Opinion of the Court of Appeals, the Court reiterates its position that the law in question is not a valid exercise of the State police power, in the following language:

> "We hold that a governmental rule relating to human conduct is not a police or public health measure if it contains express exemption from obedience available to all persons within its operation and where such exempted person need not show good cause related to the purpose of the rule as a pre-condition of his exemption." (App. p. A28)

Further corroboration that Federal constitutional questions were raised and considered by the parties and the Court of Appeals is indicated at page 12 of the Opinion of the Court of Appeals where the Court refers to issues and supportive cases raised by the State of Ohio:

> "The state relies upon *Alkire v. Cashman*, 350 F. Supp. 360 (S.D. Ohio 1972), Aff'd 477 F.2d 598 (6th Circuit 1973) as authority that Revised Code 6111.13 is a valid general law relating to police power." (App. p. A27)

This case, which determined that a municipal ordinance imposing local water fluoridation did not violate due process requirements of the Federal Constitution and could not be challenged on this basis by local residents, was distinguished by the Court of Appeals from the case herein in question, as involving different circumstances and different issues.

When the case here on appeal came on for review and decision before the Supreme Court of Ohio, the Court as a preface to commencing its analysis of the case, framed the issue before it in terms of federal due process principles, as follows:

> "The issue raised in this case is generally whether the State may require a municipality to fluoridate a municipally owned and operated water supply, and, specifically, whether RC 6111.13, which requires fluoridation, is a valid exercise of the State police power." (App. p. A4)

Going on to resolve this question, the Supreme Court citing a number of due process cases including *Kraus v. City of Cleveland*, 163 Ohio St. 559, 127 N.E.2d 609 (1955) and *Alkire v. Cashman*, 350 F. Supp. 360 (S.D. Ohio E.D. 1972), accepted the proposition that water fluoridation to prevent dental decay is a proper subject of the police power.

The Ohio Supreme Court next dealt with the important issue of whether the unique local option provision of 6111.13 ORC, which permitted any local subdivision to exempt itself from this law by voting against fluoridation at a special election within 120 days of the effective date of the statute, rendered the legislation void as an exercise of the general state police power. Again, this issue, without mention of specific federal constitutional provisions, is analyzed by the Ohio Supreme Court in the language of federal substantive due process concepts:

> "For the reasons stated above, we disagree with the holding of the Court of Appeals that the inclusion by the General Assembly of local option provisions rendered the entire statute void because they were not reasonably related to the police power." (App. p. A12)

Based upon the foregoing review of considerations contained in the opinions of both the Court of Appeals and the Supreme Court of Ohio in ruling upon this case, it is the contention of the Appellant, City of Canton, that fundamental Federal Constitutional issues were, in fact, raised and considered in both courts below; and that such Federal issues were in fact the essential issues upon which the decisions of the Court of Appeals for Stark County and of the Supreme Court of Ohio were determined.

THE FEDERAL QUESTIONS ARE SUBSTANTIAL

I. THE PROVISIONS OF THE OHIO FLUORIDATION STATUTE, 6111.13 ORC, ARE IN VIOLATION OF THE FIFTH, NINTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION AND THE SUBSTANTIVE DUE PROCESS REQUIREMENTS CONTAINED THEREIN, IN THAT SUCH PROVISIONS ARE ARBITRARY, UNREASONABLE AND NOT RELATED TO ANY COMPELLING PUBLIC INTEREST.

The purpose of 6111.13 ORC is not to purify public water supplies, or to eliminate the presence of disease-spreading bacteria or other harmful elements which may be carried within the water system itself. The acknowledged sole purpose of the law in question is to reduce the incidence of dental caries by mandatorily requiring the uniform addition of fluoride as a dental medication to all major water supply systems. This water fluoridation program is the only instance this Appellant is aware of where public water supply systems have been utilized as a medium for the mass administration of medicines or drugs to persons drinking from the public water supply. In the Appellant's view, there are serious questions concerning the constitutional propriety of such a practice, and the enforcement of such a law against the pronounced local public will.

In addition to being a measure not sufficiently related to the public health, safety or welfare, the Ohio Fluoridation Law in question is over-inclusive and invades the fundamental rights of persons to privacy and to control their own bodies and the substances ingested by them. It applies to all persons using the public water supply without

respect to individual needs and possible bad effects upon certain individuals for whom fluoride may be harmful. Also, the statute fails to take into account or consider the other readily available and feasible means of administering fluoride on an individual basis as has long been the method of administering vitamins, oral vaccines and other commonly useful medications.

That there are substantial aspects of every person's life which are of an essentially personal and private concern, and which are protected from unnecessary invasion by the constitutionally recognized right of privacy, is well established by recent decisions of this Court. In the cases of *Griswold v. Connecticut,* 381 U.S. 479 (1965) and *Roe v. Wade,* 410 U.S. 113 (1973) and other similar cases this Court has established that the practice of contraception, the marital and sexual relationships of individuals, and the personal care of one's own body are within the area protected by the fundamental right of privacy which has been construed to be derived from the Fourth, Fifth, Ninth and Fourteenth Amendments. It has further become a principle of constitution law that where in the interest of the purported public health, safety and welfare, fundamental rights are to be legislatively infringed upon, the law interfering with these rights must be reasonably related to a compelling public interest and must be narrowly drawn to avoid the problems of overbreadth. This principle is well stated in the case of *Shelton v. Tucker,* 364 U.S. 479 (1960):

> "In a series of decisions this court has held that, even though the governmental purpose be legitimate and substantial, that purpose cannot be pursued by means that broadly stifle fundamental personal liberties when the end can be more narrowly achieved. The breadth of legislative abridgement must be viewed in

the light of less drastic means for achieving the same basic purpose."

The absence of any public interest sufficiently compelling to require enactment of the Ohio Water Fluoridation Law, 6111.13 ORC, is acknowledged at page 70 of the opinion of the Ohio Supreme Court from which this appeal of the City of Canton is being taken (App. p. A12):

". . . Medical research has proven fluoridation effective in reducing dental caries, and communities with fluoridated water will generally have better dental hygiene than those without fluoridation, irrespective of a majority vote. Yet many persons strongly oppose fluoridation for religious and other reasons, plainly, the General Assembly made a political compromise—it ordered fluoridation, but permitted users of particular water supplies to choose, by local option, to avoid that order under specified conditions. As in *Stone v. Charlestown, supra,* the Ohio General Assembly determined that 'if the inhabitants of that part of the state to be immediately affected by the proposed change assent to it, public policy requires it to be made, and that, without such assent, the other considerations offered in support of it are not sufficient to justify its adoption by the . . . [General Assembly]'."

Further corroboration that the water fluoridation law is not an enactment in furtherance of a sufficient compelling state interest may be indirectly deducted from the concensus of the United States Congress as stated in 42 U.S.C. Section 201(b)(6). This legislation reflects that the addition of medications or other additives to the public water supply systems for health care purposes is not related to the supply of safe drinking water or the protection of the environment in the following language:

"No national primary drinking water regulation may require the addition of any substance for preventive health care purposes unrelated to contamination of drinking water."

For the foregoing reasons it is the Appellant, City of Canton's contention that there is a fundamental right of persons to control the care of their own bodies and to regulate the chemicals, drugs and other substances which they ingest; and that 6111.13 ORC unnecessarily interferes with this fundamental right, without having as its objective the fulfillment of any sufficiently compelling public interest.

II. THE PROVISIONS OF 6111.13 ORC, WHICH PERMIT ANY LOCAL GOVERNMENTAL SUBDIVISION TO OPT NOT TO BE SUBJECTED TO STATE WATER FLUORIDATION REQUIREMENTS BY VOTING AGAINST FLUORIDATION AT A SPECIAL LOCAL ELECTION AND WHICH LIMIT THE EXERCISE OF SUCH LOCAL ELECTION PROCESS TO A 120 DAY PERIOD FOLLOWING THE EFFECTIVE DATE OF THE LEGISLATION, ARE UNCONSTITUTIONAL AND IN VIOLATION OF THE EQUAL PROTECTION CLAUSE OF THE FOURTEENTH AMENDMENT AND THE DUE PROCESS REQUIREMENTS OF THE FIFTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION.

It is a well established principle that due process requires that a police regulation to be constitutionally valid must not only have as its object a purpose properly related to the public health, safety or welfare, but the means of implementation or carrying out the regulation must also be

reasonably related to the fulfillment of such purpose. See *Roe v. Wade,* 410 U.S. 113 (1973).

It is the contention of the Appellant, City of Canton, that the unequal and arbitrary manner in which the Ohio Fluoridation Law, 6111.13 ORC, is applied to the various Ohio communities results in a serious constitutional infirmity. A law which is a bona fide exercise of the general state police power, logically cannot at the same time also be amenable to the granting of a local option to any governmental subdivision to opt not to be affected by the general rule, by voting against the measure at a local election.

Even more apparent, this Appellant contends, is the fact that, if the issue of water fluoridation is amenable to and a proper subject for local option election, there should be no arbitrary 120-day time limit on that privilege, but it should be available to the residents of all communities to be exercised at all times or at least at reasonable intervals. The 120-day time limit prescribed is not a sufficient time for residents of a community to reasonably consider, discuss and debate the issue, circulate petitions and properly prepare to make an elective decision; nor is there any logical reason why such decision, directly affecting only local water supply systems, must be made within 120 days, or why such decision, once made, or the failure to decide within the time specified, should be permanent and irreversible. For these reasons Appellant strongly argues that the local election provisions of 6111.13 ORC are arbitrary, unreasonable and not related to the purpose of such water fluoridation law, and render the statute constitutionally invalid.

In the case herein being presented for review by the City of Canton, the unfairness and unequal application

of the law is particularly emphasized by the facts that the City of Canton on two (2) occasions prior to enactment of the water fluoridation law, namely, in November of 1959 and November of 1969 at general elections expressly voted against ordinances raised by initiative petitions seeking to impose water fluoridation upon the City water supply system. In addition to these elections, the City of Canton has expressed its will through the City Council which on September 18, 1972 passed an ordinance being Ord. No. 265/72 which prohibited the fluoridation of the water supply of the City of Canton (App. p. A26). But, yet, in spite of the repeated expressions of the local public will, because no action was taken within the 120-day period specified by 6111.13 ORC, it has been held that the City of Canton is now forever barred from making a local election concerning this issue. It should be noted that after passage of 6111.13 ORC thirty-eight communities did hold local elections within the 120-day period and thirty-six of those communities voted against water fluoridation, and have not been required to comply with this law (App. p. A26).

Section 6111.13 ORC also violates the equal protection clause of the United States Constitution, which requires that all persons similarly situated shall be treated alike under the laws of the United States and of the several states. This principle is well articulated in the case of *Eisenstadt v. Baird,* 405 U.S. 438, 447 (1972), which in quoting several other recent Supreme Court cases, states:

> ". . . the equal protection clause of that amendment does, however, deny to states the power to legislate that different treatment be accorded to persons placed by a statute into different classes on the basis of criteria wholly unrelated to the objective of that statute. A classification must be reasonable, not arbitrary, and must rest upon some ground of difference having a

fair and substantial relation to the object of the legislation, so that all persons similarly circumstanced shall be treated alike. . ."

In this same case at page (6) the Court makes the further observation that the requirement of the Equal Protection Clause that laws must be equally applied, is one of our society's most effective guarantees against arbitrary and unreasonable government regulations:

"The framers of the Constitution knew, and we should not forget today, that there is no more effective practical guarantee against arbitrary and unreasonable government than to require that the principles of law which officials would impose upon a minority must be imposed generally. Conversely, nothing opens the door to arbitrary action so effectively as to allow those officials to pick and choose only a few to whom they will apply legislation and thus to escape the political retribution that might be visited upon them if larger numbers were affected. Courts can take no better measure to assure that laws will be just than to require that laws will be equal in operation."

There is no rational basis related to the purpose of water fluoridation, for the distinction and difference in treatment afforded municipal corporations under 6111.13 Ohio Revised Code, solely dependent upon whether a local election has been held within 120 days of the effective date of that law. The fact that the Ohio Water Fluoridation Law, 6111.13 ORC, imposes different treatment upon communities and persons similarly situated, upon the arbitrary and irrelevant basis of whether a local election has been held within 120 days of the enactment of that legislation, was acknowledged by the Supreme Court of Ohio in its decision from which the City of Canton now appeals, which states in part as follows:

". . . Plainly, the General Assembly made a political compromise—it ordered fluoridation, but permitted users of particular water supplies to choose, by local option, to avoid that order under specific conditions. As in *Stone v. Charlestown, supra,* the Ohio General Assembly determined that 'if the inhabitants of that part of the state to be immediately affected by the proposed change assent to it, public policy requires it to be made, and that, without such assent, the other considerations offered in support of it are not sufficient to justify its adoption by the . . . [General Assembly]'.

"The decision as to whether the benefits to the public health of fluoridation are sufficient to require it for all, notwithstanding the concerted opposition of many individuals, is within the discretion of the General Assembly. So, too, is the decision that those immediately affected by a local fluoridation program should have an option to decide that same question for themselves." (App. p. A12)

The Appellant, City of Canton, contends that the restricted local option provisions of 6111.13 ORC, which forever deny the citizens of certain communities the right to make a local choice concerning a matter of direct local concern simply due to the fact that during an arbitrary 120-day period no action was taken to hold a special election, create a situation of denial of equal protection of law to the citizens of the City of Canton and the citizens of every Ohio community which did not hold an election within the arbitrary 120-day period.

CONCLUSION

Based upon the reasons and authorities set forth above, the Appellant, City of Canton, Ohio, respectfully urges that this Court take jurisdiction of the appeal in this cause.

Respectfully submitted,

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APPENDIX

JUDGMENT OF THE SUPREME COURT OF OHIO

(Dated November 19, 1975)

No. 75-282

THE SUPREME COURT OF THE STATE OF OHIO
THE STATE OF OHIO
CITY OF COLUMBUS

CITY OF CANTON,
Appellee,

vs.

IRA L. WHITMAN, Director of Environmental Protection,
Appellant.

APPEAL FROM THE COURT OF APPEALS
FOR STARK COUNTY

This case, here on appeal from the Court of Appeals for Stark County, was heard in the manner prescribed by law. On consideration thereof, the judgment of the Court of Appeals is reversed for the reasons stated in the opinion filed herein; and, the orders of the Environmental Board of Review and the Director of Environmental Protection are afifrmed.

OPINION OF THE SUPREME COURT OF OHIO

(Dated November 19, 1975)

No. 75-282

THE SUPREME COURT OF THE STATE OF OHIO
THE STATE OF OHIO, CITY OF COLUMBUS

CITY OF CANTON,
Appellee,

vs.

IRA L. WHITMAN, Director of Environmental Protection,
Appellant.

Environmental protection—Director's order to fluoridate municipally-owned water supply—R. C. 6111.13—Constitutionality—Valid exercise of state's police power—Does not interfere with ownership or operation of utility—Local option provision, valid.

1. Prevention and control of dental caries, a common disease of mankind, is a proper subject, in relation to public health, for legislation enacted pursuant to the police power vested in the state, as well as in municipalities, by the general laws and the Constitution of the state of Ohio. (*Kraus v. Cleveland*, 163 Ohio St. 559, approved and expanded.)

2. Police and similar regulations adopted under the powers of local self-government established by the Constitution of Ohio must yield to general laws of statewide scope and application, and statutory enactments rep-

resenting the general exercise of police power by the state prevail over police and similar regulations of a municipality adopted in the exercise of its powers of local self-government. (*State, ex rel. Klapp v. Dayton P. & L. Co.*, 10 Ohio St. 2d 14, paragraph one of the syllabus approved and followed.)

3. Legislation enacted by the state pursuant to the police power, in relation to the public health, is valid as applied to the municipal operation of a public utility under Section 4 of Article XVIII of the Ohio Constitution where such legislation does not interfere with the ownership or operation of the utility.

4. The General Assembly has discretion to enact legislation subject to local option elections by those directly affected, and a local option provision does not violate the requirement of Section 26, Article II of the Ohio Constitution, that all laws of a general nature shall have a uniform operation throughout the state.

(No. 75-282—Decided November 19, 1975.)

APPEAL from the Court of Appeals for Stark County.

The city of Canton owns and operates a public waterworks and water supply system. The city does not add fluorides to the water supply and the level of natural fluorides in the water is less than eight-tenths milligrams of fluoride per liter, the level of fluoridation required by R. C. 6111.13. On July 1, 1974, the then Ohio Director of Environmental Protection issued an order directing the city to begin fluoridating its water within 30 days.

The city appealed to the Environmental Board of Review, which upheld the order. An appeal was taken to the Court of Appeals, which reversed the orders of the Board and the Director, holding that R. C. 6111.13 was not reasonably related to the police power of the state.

The cause is now before this court pursuant to an allowance of a motion to certify the record.

Mr. Harry E. Klide, city solicitor, and *Mr. William J. Hamann,* for appellee.

Mr. William J. Brown, attorney general, and *Mr. Christopher R. Schraff,* for appellant.

STERN, *J.* The issue raised in this case is, generally, whether the state may require a municipality to fluoridate a municipally-owned-and-operated water supply, and, specifically, whether R. C. 6111.13, which requires fluoridation, is a valid exercise of the state police power.[1]

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1. R. C. 6111.13, as amended by the General Assembly in 1972 (134 Ohio Laws 766), provides in pertinent part:

"If the natural fluoride content of supplied water of a public water supply and water-works system is less than eight-tenths milligrams per liter of water, fluoride shall be added to such water to maintain a fluoride content of not less than eight-tenths milligrams per liter of water nor more than one and three-tenths milligrams per liter of water beginning:

"(A) On or before January 1, 1971, for a public water supply and water-works system supplying water to twenty thousand or more persons:

"(B) On or before January 1, 1972, for a public water supply and water-works system supplying water to five thousand or more persons, but less than twenty thousand persons. A municipal corporation may request the environmental protection agency for reimbursement of the actual cost of acquiring and installing equipment, excluding chemicals added to the water supply, necessary for compliance with division (A) or (B) of this section. The director of environmental protection, upon determination of the necessity of this cost for this purpose, shall order the reimbursement for such costs, from funds available to the agency."

Between 1969 and 1973, R. C. 6111.13 also provided:

"Within one hundred twenty days after November 17, 1969, a petition may be filed with the board of elections of a county containing a political subdivision served by a public water supply to which fluoride must be added under this section and where fluoride was not regularly added to such water supply prior to the filing of such petition, requesting that the issue of adding fluoride to this water supply be placed on the ballot at a special election in the political subdivisions of the county or adjoining counties served by the water supply, to be held on a date specified

(Continued on following page)

The purpose of fluoridation is well-known. Fluorides help prevent and control the incidence of dental caries. Fluoridation has become a familiar public health measure in the past two decades, and it is beyond questioning a proper subject for legislation pursuant to the police power. *Kraus v. Cleveland* (1955), 163 Ohio St. 559, 127 N. E. 2d 609; *Alkire v. Cashman* (S. D. Ohio E. D. 1972), 350 F. Supp. 360; *Dowell v. Tulsa* (Okla. 1954), 273 P. 2d 859; *Paduano v. New York* (1966), 17 N. Y. 2d 875, 218 N. E. 2d 339; Annotation, 43 A. L. R. 2d 453.

In *Kraus, supra,* we held that a municipality could fluoridate its municipally-owned water supply, as a proper exercise of the police power. Here, the city of Canton does not wish to fluoridate its water, and the issue is whether the state may order the city to do so.

Footnote Continued—

in the petition, not less than ninety nor more than one hundred twenty days after the date of filing the petition.

"The petition shall meet the requirements of Section 3501.38 of the Revised Code and, in addition, shall designate the political subdivisions in the county and adjoining counties served by the water supply and shall be signed by not less than ten per cent of the number of electors served by the water supply of each political subdivision who voted for Governor at the last preceding gubernatorial election. The board of elections shall place the issue on the ballot at the special election to be held in the political subdivisions served by the water supply.

"If a water supply extends into more than one county, the board of elections of the county where the petitions are filed shall, within ten days after such filing, send notice of such filing to all other boards of elections of counties served by the water supply and shall furnish all ballots for the special election.

"In political subdivisions where only a part of the electors are served by the water supply, only those electors shall be allowed to vote on the issue who sign forms provided by the board of elections stating that they are served by the water supply. The question of adding fluoride to the water supply shall be determined, at this election, by a majority vote of those voting on the issue."

The latter provisions were repealed in 1973 (135 Ohio Laws 1109), by which time the 120-day period for filing of petitions had expired.

The city contends that fluoridation is a matter of local self-government and of the operation of a municipal public utility, matters which are reserved for municipal control under the home-rule provision of the Ohio Constitution.

Section 3 of Article XVIII of the Ohio Constitution provides:

> "Municipalities shall have authority to exercise all powers of local self-government and to adopt and enforce within their limits such local police, sanitary and other similar regulations, as are not in conflict with general laws."

This section, adopted in 1912, preserved the supremacy of the state in matters of "police, sanitary and other similar regulations," while granting municipalities sovereignty in matters of local self-government, limited only by other constitutional provisions. Municipalities may enact police and similar regulations under their powers of local self-government, but such regulations "must yield to general laws of statewide scope and application, and statutory enactments representing the general exercise of police power by the state prevail over police and similar regulations in the exercise by a municipality of the powers of local self-government." *State, ex rel. Klapp v. Dayton P. & L. Co.* (1961), 10 Ohio St. 2d 14, 225 N. E. 2d 230 (paragraph one of the syllabus); *West Jefferson v. Robinson* (1965), 1 Ohio St. 2d 113, 205 N. E. 2d 382; *Cincinnati v. Hoffman* (1972), 31 Ohio St. 2d 163, 179, 285 N. E. 2d 714 (Brown, *J.*, dissenting); *Leavers v. Canton* (1964), 1 Ohio St. 2d 33, 37, 203 N. E. 2d 354.

Matters involving local self-government and those involving the police power often overlap. Even if a matter is of local concern, the local regulation may have significant extraterritorial effects, in which case it properly

becomes a matter of statewide concern for the General Assembly. *Cleveland Electric Illuminating Co. v. Painesville* (1968), 15 Ohio St. 2d 125, 239 N. E. 2d 75; *Beachwood v. Bd. of Elections* (1958), 167 Ohio St. 369, 371, 148 N. E. 2d 921. Similarly, a matter which relates to exercise of the police power by a municipality, *e. g.*, the appointment of officers to the police force, may essentially be an exercise of local self-government not subject to state authority. *State, ex rel. Canada v. Phillips* (1958), 168 Ohio St. 191, 151 N. E. 2d 722.

The power of local self-government and that of the general police power are constitutional grants of authority equivalent in dignity. A city may not regulate activities outside its borders, and the state may not restrict the exercise of the powers of self-government within a city. The city may exercise the police power within its borders, but the general laws of the state are supreme in the exercise of the police power, regardless of whether the matter is one which might also properly be a subject of municipal legislation. Where there is a direct conflict, the state regulation prevails.

The city contends further that the power to fluoridate is a "power of local self-government." That argument is necessarily rejected by the decision of this court in *Kraus v. Cleveland, supra.* See, also, *Beachwood v. Bd. of Elections, supra.* The decision to fluoridate is intrinsically one involving public health. Whether it is decided by an exercise of local self-government is irrelevant, for its validity must depend upon whether it bears a substantial relationship to the public health. In *Kraus*, the court held that fluoridation is a proper subject for exercise of the police power when enacted by a municipality, and was not "in contravention of the general laws in relation to adulteration or the practice of medicine." Flu-

oridation is equally a proper subject for the exercise of the state police power, and a municipal ordinance in contravention of a general state law requiring fluoridation is invalid. The public health is a matter of state as well as local concern (*State, ex rel. Mowrer v. Underwood* [1940], 137 Ohio St. 1, 27 N. E. 2d 773; *State, ex rel. Cuyahoga Heights v. Zangerle* [1921], 103 Ohio St. 566, 134 N. E. 686), and that concern extends to those ills which affect us individually, as well as those which we transmit to one another.

As this court stated in *Kraus, supra,* at page 562:

> "* * * An examination shows that laws relating to child labor, minimum wages for women and minors and maximum hours for women and minors have all been upheld on the basis of the police power in relation to public health. Regulations relating to control of venereal disease, blood tests for marriage licenses, sterilization, pasteurization of milk, chlorination of water and vaccination have all been held valid as based on police power exercised in regard to public health.
>
> "Clearly neither an overriding public necessity or emergency nor infectious or contagious diseases are the criteria which authorize the exercise of the police power in relation to public health."

The city of Canton also contends that the fluoridation legislation interferes with the power to own or operate public utilities, granted by Section 4 of Article XVIII. That section reads:

> "Any municipality may acquire, construct, own, lease and operate within or without its corporate limits, any public utility the product or service of which is or is to be supplied to the municipality or its inhabitants, and may contract with others for any such product or service. * * *"

Those rights and privileges are derived directly from the people through the Constitution, and the General Assembly may not impose restrictions upon the power to operate a public utility granted to a municipality under Article XVIII of the Ohio Constitution. *State, ex rel. McCann v. Defiance* (1958), 167 Ohio St. 313, 148 N. E. 2d 221; *Swank v. Shiloh* (1957), 166 Ohio St. 415, 143 N. E. 2d 586; *Euclid v. Camp Wise Assn.* (1921), 102 Ohio St. 207, 131 N. E. 349. It may, however, enact legislation under its general police power to protect the public health and safety. *State, ex rel. McCann v. Defiance, supra; Akron v. Pub. Util. Comm.* (1948), 149 Ohio St. 347, 78 N. E. 2d 890; *Bucyrus v. Dept. of Health* (1929), 120 Ohio St. 426, 166 N. E. 370.

The ownership and operation of a municipal waterworks is not limited by a state requirement that fluorides be added to the water in the interest of the public health, to any greater degree than by other health and safety requirements affecting the purity of the water or the safety of plant operations. The state, in fact, supplies the equipment necessary to add the fluorides. An exercise of the police power necessarily occasions some interference with other rights, but that exercise is valid if it bears a real and substantial relationship to the public health, safety, morals or general welfare, and if it is not unreasonable or arbitrary. *Piqua v. Zimmerlin* (1880), 35 Ohio St. 507, 511. Fluoridation is plainly a matter involving the public health; there is no indication that it unreasonably restricts, limits, or otherwise interferes with the operation of a municipal utility.

The effect of fluoridating a water supply is a local one, limited to the area served by the system.[2]

The local interest in the decision regarding fluoridation is clear, while the interest of the state is not as direct as in the areas of infectious diseases or of pollution. Cf. *Bucyrus v. Dept. of Health, supra.* However, the mandate of Section 3 of Article XVIII of the Ohio Constitution is that municipal exercise of the police power is valid only insofar as it does not conflict with general state laws, regardless of whether the matter might also be decided locally.

In fact, the General Assembly did permit the users of local water supplies to decide whether to fluoridate their water. R. C. 6111.13 contained provisions which authorized a special election to be called within 120 days of the effective date of the legislation, November 17, 1969, by the users of any water supply system which did not then add fluorides. The question of fluoridation would be decided by a majority vote. Thirty-eight such elections were held, and in thirty-six the vote was against fluoridation. No special election was held in the area supplied by the city of Canton waterworks, although fluoridation had previously been rejected in two general elections.

The city contends that the local option provision of R. C. 6111.13 prevented that section from being valid as a general law, because its effect was to require some water suppliers to fluoridate, while allowing others, whose users held a referendum, to avoid that requirement.

The referendum provisions of R. C. 6111.13 are somewhat unusual, in that they require that the referendum

2. In the case of a municipal water supply, the area served is not limited by municipal boundaries, for the municipality may sell any amount of its surplus water to other communities. Section 6, Article XVIII of the Ohio Constitution.

be held, if at all, within 120 days, and require that the voters be only those using the water supply, regardless of the political subdivision in which they might reside. Essentially, however, the provisions are for a local option, and no claim is raised that those provisions are unreasonable.

The principle of local options is well-established. It is a legislative deferral to differing local needs and attitudes, a principle which is also embodied in the home-rule provisions. Local option laws are upheld by the great weight of authority (*Locke's Appeal* [1873], 72 Pa. 491, 13 Am. Rep. 716; 16 Am. Jur. 2d 508; 16 C. J. S. 680; 79 L. Ed. 562), and their enactment lies within the discretion of the General Assembly. As stated in *Stone v. Charlestown* (1873), 114 Mass. 214, 221:

> "* * * In doing so, the Legislature does not, in any sense, delegate its constitutional authority, but, in the exercise of that authority, determines that if the inhabitants of that part of the state to be immediately affected by the proposed change assent to it, public policy requires it to be made, and that, without such assent, the other considerations offered in support of it are not sufficient to justify its adoption by the Legislature. The question whether the act shall take effect at once, or only upon such acceptance by the inhabitants, is within the discretion of the Legislature to determine."

A local-option law is also not objectionable as not having a uniform operation throughout the state, as required by Section 26 of Article II of the Ohio Constitution. As the court stated in *Gordon v. State* (1889), 46 Ohio St. 607, 628, upholding a local option liquor law:

"* * * The provisions of the act are bounded only by the limits of the state, and uniformity in its operation is not destroyed, because the electors in one or more townships may not see fit to avail themselves of its provisions. The act makes no discrimination between localities to the exclusion of any township. Every township in the state comes within the purview of the law, and may have the advantage of its provisions by complying with its terms. The operation of the statute is the same in all parts of the state, under the same circumstances and conditions." See, also, *Cincinnati W. & Z. R. Co. v. Commrs. of Clinton County* (1852), 1 Ohio St. 77.

The fluoridation local option was similarly applied uniformly throughout the state, and made no discrimination between one locality and another. The users of all affected water supply systems were equally permitted to petition for a local option election.

For the reasons stated above, we disagree with the holding of the Court of Appeals that the inclusion by the General Assembly of local option provisions rendered the entire statute void because they were not reasonably related to the police power. It is, of course, true that the beneficial effects of fluoridation upon the public health are unrelated to the votes of a majority in any community. Medical research has proven fluoridation effective in reducing dental caries, and communities with fluoridated water will generally have better dental hygiene than those without fluoridation, irrespective of a majority vote. Yet many persons strongly oppose fluoridation for religious and other reasons. Plainly, the General Assembly made a political compromise—it ordered fluoridation, but permitted users of particular water supplies to choose, by local option, to avoid that order under specified conditions. As in *Stone v. Charlestown, supra,* the Ohio General Assembly determined that "if the inhabitants of that part of the state to be immediately affected by the proposed change assent to it, public policy requires it to be made, and that, without such assent, the other considerations offered in support of it are not sufficient to justify its adoption by the * * * [General Assembly]."

The decision as to whether the benefits to the public health of fluoridation are sufficient to require it for all, notwithstanding the concerted opposition of many individuals, is within the discretion of the General Assembly. So, too, is the decision that those immediately affected by a local fluoridation program should have an option to decide that same question for themselves.

For the foregoing reasons, the judgment of the Court of Appeals is reversed, and the orders of the Environmental Board of Review and the Director of Environmental Protection are affirmed.

Judgment reversed.

O'NEILL, C. J., HERBERT, W. BROWN and P. BROWN, *JJ.*, concur.

CORRIGAN and CELEBREZZE, *JJ.*, dissent.

NOTICE OF APPEAL TO THE SUPREME COURT OF THE UNITED STATES

(Filed in the Supreme Court of Ohio January 20, 1976)

Case No. 75-282

IN THE SUPREME COURT OF OHIO
January 1976

NED E. WILLIAMS, Director of Environmental Protection, State of Ohio,
Appellant,

vs.

CITY OF CANTON, OHIO,
Appellee.

NOTICE OF APPEAL TO THE SUPREME COURT OF THE UNITED STATES

Notice is hereby given that the above named Appellee, City of Canton, hereby appeals to the Supreme Court of the United States from the final judgment entered by the Supreme Court of Ohio, on November 19, 1975, which judgment reversed the previous judgment of the Court of Appeals for Stark County, Ohio, Fifth Ohio Appellate District and ordered the Appellee, City of Canton, Ohio, to bring its water supply system into conformity with the water fluoridation standards set by Ohio Revised Code 6111.13 and to comply with the Order of the Ohio Director of Environmental Protection requiring the City of Canton to implement such standards.

This appeal is being taken pursuant to the provisions of 28 U.S.C. Section 1257(2).

/s/ HARRY E. KLIDE
City Solicitor

/s/ WILLIAM J. HAMANN
Chief Counsel
Department of Law
City Hall Building
Canton, Ohio 44702
Telephone: (216) 455-8951

AFFIDAVIT OF PROOF OF SERVICE

I, William J. Hamann, an attorney in the office of the City Solicitor of the City of Canton, Ohio, the attorney of record for the city of Canton, Ohio, Appellee herein, having been duly sworn according to law, depose and say that on the 15th day of January, 1976, I served a copy of the foregoing Notice of Appeal upon the Appellant, Ned E. Williams, Director of Environmental Protection of the State of Ohio, by mailing the same to William J. Brown, Attorney General of Ohio, counsel of record for said Appellant, at 361 East Broad Street, Columbus, Ohio 43215, by certified United States Mail.

/s/ WILLIAM J. HAMANN
Chief Counsel

NOTICE OF APPEAL TO THE SUPREME COURT OF THE UNITED STATES

(Filed in the Court of Appeals of Stark County, Ohio January 16, 1976)

Case No. 4116

IN THE COURT OF APPEALS
STARK COUNTY, OHIO
FIFTH APPELLATE DISTRICT

CITY OF CANTON,
Appellant,

vs.

IRA L. WHITMAN, Director of Environmental Protection,
Appellee.

NOTICE OF APPEAL TO THE SUPREME COURT
COURT OF THE UNITED STATES

Notice is hereby given that the above named Appellant, City of Canton, hereby appeals to the Supreme Court of the United States from the final judgment entered by the Supreme Court of Ohio, on November 19, 1975, which judgment reversed the previous judgment of the Court of Appeals for Stark County, Ohio, Fifth Ohio Appellate District and ordered the Appellant, City of Canton, Ohio, to bring its water supply system into conformity with the water fluoridation standards set by Ohio Revised Code 6111.13 and to comply with the Order of the Ohio Director of Environmental Protection requiring the City of Canton to implement such standards.

This appeal is being taken pursuant to the provisions of 28 U.S.C. Section 1257(2).

/s/ HARRY E. KLIDE
City Solicitor

/s/ WILLIAM J. HAMANN
Chief Counsel

Department of Law
City Hall Building
Canton, Ohio 44702
Telephone: (216) 455-8951

AFFIDAVIT OF PROOF OF SERVICE

I, William J. Hamann, an attorney in the office of the City Solicitor of the City of Canton, Ohio, the attorney of record for the City of Canton, Ohio, Appellant herein, having been duly sworn according to law, depose and say that on the 16th day of January, 1976, I served a copy of the foregoing Notice of Appeal upon all parties to the proceedings below by serving a copy of same upon the Appellee, Ned E. Williams, Director of Environmental Protection of the State of Ohio, by mailing the same to William J. Brown, Attorney General of Ohio, counsel of record for said Appellant, at 361 East Broad Street, Columbus, Ohio, 43215, by certified United States Mail.

/s/ WILLIAM J. HAMANN
Chief Counsel

JUDGMENT ENTRY OF THE COURT OF APPEALS OF STARK COUNTY, OHIO

(Filed January 29, 1975)

Case No. 4116

IN THE COURT OF APPEALS
FIFTH DISTRICT
STARK COUNTY, OHIO

CITY OF CANTON,
Plaintiff-Appellant,

vs.

IRA L. WHITMAN, Director of Environmental Protection,
Defendant-Appellee.

JUDGEMENT ENTRY

For the reasons stated in the memoranda on file, we find the order of the Director of Environmental Protection and the order of the Ohio Environmental Board of Review affirming said order to be contrary to law and said order is reversed.

/s/ NORMAN J. PUTMAN
/s/ LELAND RUTHERFORD
/s/ ROBERT E. COOK

OPINION OF THE COURT OF APPEALS OF STARK COUNTY, OHIO

(Decided January 29, 1975)

Case No. 4116

IN THE COURT OF APPEALS
FIFTH DISTRICT
STARK COUNTY, OHIO

CITY OF CANTON,
Plaintiff-Appellant,

vs.

IRA L. WHITMAN, Director of Environmental Protection,
Defendant-Appellee.

PUTMAN, *P.J.*

This is an appeal from a final order of the Ohio Environmental Board of Review, a statutory administrative appellate tribunal, affirming an order of the Director of Environmental Protection directing the City of Canton to comply with Section 6111.13 of the Ohio Revised Code by fluoridating its public water supply system. The Board, in affirming the order of the Director of Environmental Protection as being lawful and reasonable, refused to pass upon questions of Ohio constitutional law raised by the City of Canton, holding that it was barred from considering constitutional questions by the Ohio Supreme Court's decisions in *State ex rel. Park Investment Co. v. Board of Tax Appeals*, 32 Ohio St. 2d 28, 289 N.E. 2d 579 (1972) and *Mobil Oil Co. v. City of Rocky River*, 38 Ohio St. 2d 23.

This appeal raises only those constitutional questions which were not passed upon by the Environmental Board of Review. See findings of fact of the Board of Review (R. 9).

The City of Canton is a municipal corporation which owns and operates a public water supply system which supplies water to twenty thousand (20,000) or more persons. On January 28, 1974, Dr. Ira L. Whitman, Director of the Ohio Environmental Protection Agency, received a letter from Harry J. Guist, D.D.S., complaining of a violation of R.C. 6111.13 and enclosing various documents which evidenced a failure by the City of Canton to fluoridate its public water supply in accordance with that section. After investigation of the complaint and inspection of the Canton public water supply system, the Director issued a notice to the City of Canton on April 17, 1974, pursuant to R.C. 6111.18, setting forth his findings that the City of Canton water supply did not have the fluoride content specified by R.C. 6111.13, that the City of Canton was not fluoridating the public water supply, and that the City of Canton was in violation of R.C. 6111.13. The Director ordered that an evidentiary hearing be held on June 10, 1974, for the purpose of ordering compliance with the provisions of R.C. 6111.13. The notice was amended on April 24, 1974, to cure a clerical error in the original notice.

Prior to June 10, 1974, counsel for the City of Canton and the Ohio EPA entered into a stipulation of the following facts:

1. Canton is a municipal corporation which owns and operates a public water supply and water works system which supplies water to twenty thousand or more persons.

2. The natural fluoride content of the public water supply and water works system is less than eight-tenth milligrams of fluoride per liter of water (.8 mg/1), as specified in R.C. 6111.13.

3. The City of Canton is not presently adding fluoride to its public water supply and water works system to maintain a fluoride content of not less than eight-tenth milligrams per liter of water (.8 mg/1) nor more than one and three-tenths milligrams per liter of water (1.3 mg/1) as specified in R.C. 6111.13.

4. Samples of treated water taken from the Canton Public Water Supply revealed, on February 6, 1974, a fluoride content of 0.10 to 0.14 milligrams per liter of water.

5. The City of Canton is not complying with the fluoride-adding directive contained in R.C. 6111.13.

Based upon these stipulated facts, the hearing examiner cancelled the scheduled evidentiary hearing, no other material facts being in issue, and recommended that the Director find that a violation of R.C. 6111.13 existed and order that the provisions of that section be complied with. On July 1, 1974, the Director issued "Final Findings and Orders," in which he found that the City of Canton was not fluoridating its water supply and ordered the City of Canton to "install and place in operation all devices necessary and appropriate to maintain the fluoride content of supplied water at the levels specified in R.C. 6111.13 within thirty (30) days of this order."

On July 17, 1974, the City of Canton appealed the final order of the Director to the Ohio Environmental Board of Review, setting forth as its objections that Article XVIII, Sections 3 and 4 of the Ohio Constitution vested the City of Canton with sole discretion whether to fluori-

date its public water supply system and that the City of Canton has, by general election and subsequent local ordinances, prohibited the fluoridation of its water supply system. After a hearing on August 30, 1974, the Environmental Board of Review, on September 4, 1974, held that the order of the Director was a lawful and reasonable order. However, the Board ruled that it was without power to consider the constitutional questions raised by the City of Canton. The City, in open court, expressly rejected all claims of error except those based upon constitutional issues which were not ruled upon by the environmental Board of Review.

This appeal presents only the following legal issues:

1. Is R.C. 6111.13 a valid general law within the meaning of Article II, Section 26 of the Ohio Constitution.

2. Does it relate to police, sanitary and other similar regulations which, under Article XVIII, Section 3 of the Ohio Constitution, supersede conflicting local law, or regulations of the City of Canton.

3. Does Section R.C. 6111.13 require the City of Canton to fluoridate its public water supply system, not withstanding the authority granted to municipalities under Article XVIII, Section 4 of the Ohio Constitution to acquire, construct, own, lease and operate a public utility.

The sole assignment of error is that the order appealed from is contrary to law by reason of Ohio Constitutional infirmity. No federal claim has been made.

Article II, Section 26 of the Ohio Constitution provides in pertinent part as follows:

> "All laws, of a general nature, shall have a uniform operation throughout the state; nor, shall any act, except such as relates to public schools, be passed,

> to take effect upon the approval of any other authority than the general assembly, except, as otherwise provided in this constitution."

Article XVIII, Section 3 and 4 of the Ohio Constitution provides:

SECTION 3 POWERS.

> "Municipalities shall have authority to exercise all powers of local self-government and to adopt and enforce within their limits such local police, sanitary and other similar regulations, as are not in conflict with general laws."

SECTION 4, ACQUISITION OF PUBLIC UTILITY; CONTRACT FOR SERVICE: CONDEMNATION.

> "Any municipality may acquire, construct, own, lease and operate within or without its corporate limits, any public utility the product or service of which is or is to be supplied to the municipality or its inhabitants, and may contract with others for any such product or service. The acquisition of any such public utility may be by condemnation or otherwise, and a municipality may acquire thereby the use of or full title to the property and franchise of any company or person supplying to the municipality or its inhabitants the service or product of any such utility."

R.C. 6111.13 was amended by the General Assembly in 1969 to provide, in pertinent part:

> "If the natural fluoride content of supplied water of a public water supply and water works system is less than eight-tenths milligrams per liter of water, *fluoride shall be added* to such water to maintain

a fluoride content of not less than eight-tenths milligrams per liter of water nor more than one and three-tenths milligrams per liter of water beginning:

(A) *On or before January 1, 1971, for a public water supply and water-works system supplying water to twenty thousand or more persons*;

(B) On or before January 1, 1972, for a public water supply and water-works system supplying water to five thousand or more persons, but less than twenty thousand persons. A person or entity operating a public water supply and water-works system may request the environmental protection agency for reimbursement of the actual cost of acquiring and installing equipment, excluding chemicals added to the water supply, necessary for compliance with division (A) or (B) of this section. The director of environmental protection, upon determination of the necessity of this cost for this purpose, shall order the reimbursement for such costs, from funds available to the agency." (Emphasis added)

Between 1969 and 1973, R.C. 6111.13 also provided:

> "*Within one hundred twenty days after November 17, 1969 a petition may be filed* with the board of elections of a county containing a political subdivision served by a public water supply to which fluoride must be added under this section and where fluoride was not regularly added to such water supply prior to the filing of such petition, *requesting that the issue of adding fluoride to this water supply be placed on the ballot at a special election* in the political subdivision of the county or adjoining counties served by the water supply, to be held on a date specified in

> the petition, not less than ninety nor more than one hundred twenty days after the date of filing the petition.
>
> The petition shall meet the requirements of section 3501.38 of the Revised Code and, in addition, shall designate the political subdivisions in the county and adjoining counties served by the water supply and shall be signed by not less than ten per cent of the number of electors served by the water supply of each political subdivision who voted for governor at the last preceding gubernatorial election. The board of elections shall place the issue on the ballot at the special election to be held in the political subdivisions served by the water supply.
>
> If the water supply extends into more than one county, the board of elections of the county where the petitions are filed shall, within ten days after such filing, send notice of such filing to all other boards of elections of counties served by the water supply and shall furnish all ballots for the special election.
>
> In political subdivisions where only a part of the electors are served by the water supply, only those electors shall be allowed to vote on the issue who sign forms provided by the board of elections stating that they are served by the water supply. *The question of adding fluoride to the water supply shall be determined, at this election,* by a majority vote of those voting on the issue." (Emphasis added)

The election provision was omitted in 1973, when R.C. 6111.13 was amended because the statutory 120 day period in which to file a petition for a special election had expired. Some municipalities have by election within the time pro-

vided, determined that fluorides should not be added to the water supply. No such special election was held in the City of Canton within the statutorily prescribed 120 day period. An ordinance was proposed by initiative petition in the general election in 1959 which prohibited fluoridation of the Canton Water Supply System. The proposed ordinance was passed on November 3, 1959. Another proposed ordinance authoring fluoridation of the Canton water supply system was defeated on November 6, 1962. The Canton City Council enacted Ordinance No. 265/72 on September 18, 1972, which reaffirmed the initiated ordinance of November 3, 1959 and prohibited fluoridation of the Canton water supply system.

R.C. 6111.30 imposes serious personal penalties upon officers of non-complying subdivisions.

Moving first to the claim of the city based upon that provision of the Ohio Constitution (Article XVIII, Section 4) empowering cities to operate public utilities, we find nothing in that particular section to support the position of the city.

We analyze the issues as follows:

The Ohio Legislature requires fluorides to be added to public water supplies except in areas which, within a certain time, vote to the contrary. (R.C. 6111.13) Stated otherwise, no area need obey the statutory command if promptly it expresses, by election, its desire not to obey.

This case raises the question whether such a law is a police regulation. Is it an exercise of police power to provide that all must comply with the rule, except those who elect not to comply? We hold it is not. If anyone who choses not to obey need not obey, then that law is not related to public health, safety or welfare.

The State relies upon *Alkire v. Cashman,* 350 F. Supp. 360 (S.D. Ohio 1972) aff'd 477 F. 2d 598 (6th Cir. 1973) as authority that R.C. 6111.13 is a valid general law relating to police power. That case does not support that claim. There Columbus residents sought to enjoin city officials who were proceeding under ordinance to comply with R.C. 6111.13. Citing *Kraus v. Cleveland,* 163 Ohio St. 559 (1955) the federal court held in substance, that the Ohio law was settled upon the point that where city officials had determined to add fluorides to the public water supply, a taxpayer could not stop them by injunction upon the claim that that decision of the city officials was not related to the police power of the city.

We have carefully read both above cited cases and find they do not decide the claim of an unwilling city government against the government of Ohio that R.C. 6111.13 cannot stand against the adverse Ohio Constitution claims raised by a dissenting municipal corporation. We hold a governmental order which commands all to obey, except those who elect quickly not to obey, does not reasonably relate to the police power, (Article XVIII, Section 3 of the Ohio Constitution) nor have public health as its objective. This lawsuit has nothing to do with the question of whether the use of fluoride is healthful or beneficial. The city has not raised any such question.

This court's position is that a command which provides any or all may elect not to obey it, is not governmental in nature and is not an exercise of the police power.

Considering now the home rule powers of the city, we find that the words in Article XVIII, Section 3, "as are not in conflict with the general laws", modify the words "local police, sanitary and other similar regulations" but do not modify the words "powers of local self government." See *State ex rel. Canada v. Phillips,* 168 O.S. 191, 5 OO 2d 481, 151 N.E. (2d [illegible]2.

It follows therefore, that the City of Canton is free to enact its own ordinances respecting the addition of fluorides to the water since there do not exist any conflicting state statutes relating to "police, sanitary and other similar regulations" covering the same subject.

For that reason, it is immaterial whether R.C. 6111.13 is a valid general law within the purview of Article II, Section 26 of the Ohio Constitution. Conceding arguendo that R.C. 6111.13 "operates uniformly" within the meaning of Article II, Section 26 of the Ohio Constitution, it is nevertheless not a police, sanitary or other regulation against whose provisions conflicting local ordinances would fall.

We hold that a government rule relating to human conduct is not a police or public health measure if it contains express exemptions from obedience available to all persons within its operation and where such exempted person need not show good cause related to the purpose of the rule as a pre-condition of his exemption.

The State of Ohio conceded, in open court, that the question of whether Canton has adopted a charter is of no importance in determining the issues in this case and we so find.

For the foregoing reasons, we find the order of the Director of Environmental Protection and the order of the Ohio Environmental Board of Review affirming said order to be contrary to law and said order is reversed.

Rutherford, J. and Cook, J. concur.

/s/ NORMAN J. PUTMAN
/s/ LELAND RUTHERFORD
/s/ ROBERT E. COOK
Judges

RUTHERFORD, J. concurs.

RUTHERFORD, J. concurring.

In addition to that which is set forth in the opinion as well as in the judgment rendered by this court, in both of which I concur, it is noted that in *Kraus v. City of Cleveland*, 163 O.S. 559, at page 562 of the opinion it is stated:

> ". . . laws relating to child labor, minimum wages for women and minors and maximum hours for women and minors. . . ." (and) "Regulations relating to control of veneral disease, blood tests for marriage licenses, sterilization, pasteurization of milk, chlorination of water and vaccination have all been held valid as based on police power exercised in regard to public health."

In considering such other regulations as compared with state regulation requiring fluoridation of public water by systems supplying water to 5000 or more persons, no distinction was noted by the court between the regulations relating to the aforesaid purposes and a regulation by city ordinance relating to fluoridation of such water supplies. The question of whether a state statute (Section 6111.13, Rev. Code) is a valid general law within the meaning of Article II, Section 26 of the Ohio Constitution was not before the court.

In each of the categories, other than fluoridation, mentioned in *Kraus v. City of Cleveland, supra*, the regulation is brought about by necessity to control those things which, absent the regulations imposed, in and of themselves create a hazard to public health. For example, chlorination of water is justified because absent chlorination the water is unsafe and the cause of typhoid and other general health hazards resulting from consumption of the untreated water.

Likewise, control of minimum wages for women and minors and maximum hours for women and minors is for the purpose of controlling those acts fixing wages and hours which, absent control, effect the public health and welfare of women and minors. The control of veneral disease, blood tests for marriage license, and sterilization is for the purpose of controlling those circumstances which if uncontrolled effect generally the health of others including the regulation of conditions affecting births which if left uncontrolled create health hazards to those born under such conditions. The same is true as to vaccinations.

On the other hand there is no evidence that public water supplies absent fluoridation cause or contribute to the cause of tooth decay. The purpose of fluoride is not to eliminate any hazard caused by the water supply. The purpose is solely to use the water as a conveyor of enforced medication. In 1955 when *Kraus v. Cleveland, supra,* was decided it was stated:

> ". . . Although it is admitted that private care would be as effective, the record shows that there are not sufficient private dental facilities to perform the task. . . ."

Fluoride has since been made available through private care at little expense. Fluoridation of water is clearly distinguishable in all of its aspects from the other aforementioned regulatory measures, the question becoming one of whether under the circumstances Section 6111.13, Rev. Code, is a valid general law within the purview of Article II, Section 26 of the Ohio Constitution.

The City of Canton contends that the people within the Canton water works system are not concerned with whether or not another municipality is required to fluoridate its water works system; that the fact that another municipality does not do so does not effect the people served by the City of Canton water works system since they are not dependent on such other water supply and if they do on occasion use such other supply, such water does not endanger their teeth or health by the absence of fluoride.

It seems that the legislature recognized the same contentions and therefore recognizing that the statute ought not to require general application recognized powers of local self-government as applicable to fluoridization by commanding only that all obey except those who elect quickly not to obey.

In addition to the legislature the municipal authorities have obviously recognized the distinctions herein noted as have the people who have by vote determined not to fluoridate. Neither has so reacted to other public health measures heretofore set forth.

/s/ LELAND RUTHERFORD
Judge

/s/ NORMAN J. PUTMAN

/s/ ROBERT E. COOK

NOTICE OF APPEAL TO THE COURT OF APPEALS

(Filed October 1, 1974)

Case No. 4116

IN THE COURT OF APPEALS
FIFTH APPELLATE DISTRICT
STARK COUNTY, OHIO

CITY OF CANTON,
Appellant,

vs.

IRA L. WHITMAN, Director of Environmental Protection,
Appellee.

NOTICE OF APPEAL

Now comes the City of Canton, Appellant herein, and hereby files with the Court its Notice of Appeal from the Findings of Fact and Final Order of the Environmental Board of Review, State of Ohio. Said Findings of Fact and Final Order were received on September 5, 1974 by the Appellant. A copy of said Findings of Fact and Final Order is hereby incorporated into this Notice of Appeal and attached hereto.

Appellant files this Notice of Appeal for the reasons that the Final Order of said Environmental Board of Review is unlawful, unreasonable, void, and contrary to the laws and Constitution of the State of Ohio and of the United States.

Further, Appellant appeals on the following grounds:

1. Ohio Revised Code Section 6111.13 relating to the fluoridation of water supplies is not a general law within

the meaning of Article XVIII, Section 3 of the Constitution of the State of Ohio, and, therefore, the City of Canton has the right to determine whether to fluoridate its system.

2. Pursuant to Article XVIII, Section 4 of the Constitution of the State of Ohio, the water supply of the City of Canton, Ohio, is a public utility for which the power to operate said utility solely rests with the City of Canton.

3. The City of Canton, pursuant to its Home Rule process, has passed an ordinance, 265/72, stating that it does not desire to fluoridate its water.

4. The citizens of the City of Canton in the elections of November 3, 1959 and November 6, 1962 have stated that they do not want their water fluoridated.

/s/ WILLIAM J. HAMANN
Chief Counsel
Department of Law
City Hall Building
Canton, Ohio 44702
Phone: 455-8951, Ext. 251

PROOF OF SERVICE

I have hereby sent by certified mail a copy of the above Notice of Appeal along with Findings of Fact and Final Order to the Environmental Board of Review, 33 North High Street, Suite 505, Columbus, Ohio, 43215 and to the Director of Environmental Protection, Ira L. Whitman, P. O. Box 1049, Columbus, Ohio, 43215.

/s/ WILLIAM J. HAMANN
Chief Counsel

FINDINGS OF FACT AND FINAL ORDER OF THE ENVIRONMENTAL BOARD OF REVIEW

(Issued September 4, 1974)

Case No. EBR 74-30

BEFORE THE ENVIRONMENTAL BOARD OF REVIEW
STATE OF OHIO

CITY OF CANTON,
Appellant,

v.

IRA L. WHITMAN, Director of Environmental Protection,
Appellee.

FINDINGS OF FACT AND FINAL ORDER

I.

On July 22, 1974, the Board received from the City of Canton a Notice of Appeal of an order of the Director dated July 1, 1974. On July 22, 1974, the Board issued an order to the Appellant requiring that Appellant amend its Notice of Appeal in order to conform with the requirements of EBR-§3-05, thus enabling the Board to act in conformity with sec. 3745.04 of the Revised Code. No Motion for Stay was filed with the Board. The Amended Notice of Appeal was received by the Board from the Appellant on July 26, 1974 and the Board set the appeal for hearing on August 30, 1974.

At the hearing, counsel for both parties agreed that the proceedings previously conducted before the Director constituted the proceedings before the Board as being a hearing on the certified record rather than a hearing *de*

novo. A hearing had been scheduled before a Hearing Examiner, Michael D. Cotleur. Before it could be held, the parties on May 29, 1974 had filed a "Stipulation" with the Hearing Examiner. The Hearing Examiner in his report of June 4, 1974, which cancelled the hearing to have been held before him, summarized the stipulation as follows:

"(1) Canton, a municipal corporation, owns and operates a public water supply and water works system which supplies water to 20,000 or more people.

(2) The natural fluoride content of said system is less than .8 milligrams of fluoride per liter of water as specified in Section 6111.13.

(3) Canton is not presently adding fluoride to its system to maintain a fluoride content of not less than .8, nor more than 1.3, milligrams per liter of water, as specified in Section 6111.13.

(4) Samples of treated water taken from the Canton public water supply revealed, on February 6, 1974, a fluoride content of 0.10 to 0.14 milligrams per liter of water.

(5) Canton is not complying with the fluoride-adding directive contained in Section 6111.13, Revised Code." Record of Proceedings, EBR 74-30(2), p. 2.

On the basis of the opportunity afforded the Appellant to have had a hearing before a Hearing Examiner of the Ohio Environmental Protection Agency, the foregoing of that opportunity at the option of the Appellant, and the stipulation entered into by the Appellant with the Director, the Board can only agree with the parties that the requirements of sec. 119.09 and sec. 119.10 of the Revised Code have been met; and that the hearing to be held by the

Board in this appeal under sec. 3745.05 of the Revised Code, as stated by counsel for the parties, had to be a hearing upon the certified record rather than a hearing *de novo*, Transcript pp. 3-5. At the hearing on August 30, 1974, the Board proceeded to the holding of a hearing on the certified record of the proceedings before the Director.

At the hearing on August 30, 1974, the Appellant moved for a stay of the order of the Director of July 1, 1974 until such time as the Board should enter their final order in this appeal. The counsel for the Director stated that the Director desired to offer no opposition to that motion. The Board at the hearing granted the Appellant's Motion for Stay until the entry of the Board's final order in this appeal, Transcript, pp. 15-16.

At the hearing of August 30, 1974, the Appellant offered copies of Ordinance No. 265/72 of the City of Canton, adopted September 18, 1972, and a Certified Copy from the Stark County Board of Elections of the election ballots used in two initiatives or referenda on the issue of fluoridation held by the City of Canton. Counsel for Appellant noted that the clerk of the Stark County Board of Elections had mistakenly certified one of these ballots as having been used in a general election held November 6, 1974. Counsel stated that this should be corrected to read November 6, 1962, *Ibid.*, remarks of Mr. Hamann, p. 6.

The Board concluded that these documents could not be exhibits since the hearing was not *de novo* and was consequently not one at which new evidence could be introduced. They also could not be part of the certified record of proceedings upon which the hearing was being conducted since only the Director could certify that record. The Board, however, was of the opinion that they could take administrative notice of these items, most particularly the ordinance of the City of Canton, and that these would

be marked as follows: (1) Canton City Ordinance 265/72 as Appellant's Record Item No. 1; and (2) the certified copies of the ballots, as corrected by counsel for Appellant, as Appellant's Record Item No. 2. These would then become part of the record of the proceedings before this Board to be certified in the event the final order of this Board should be appealed, *Ibid.*, pp. 6-7. Counsel for the Director had no objection to this procedure and did not assert that the ordinance of which the Board announced their intention to take judicial notice was not the effective and applicable ordinance of the City of Canton, *Ibid.*, p. 5.

The Board must also note that the ordinance also appears in the Record of Proceedings, EBR 74-30(6)(VI), as certified by the Director to the Board on July 24, 1974. As a consequence, the Board has the document before them outside the scope of administrative notice and shall consider it as they would other items appearing in the record certified by the Director.

II.

The first issue before the Board is whether or not the Amended Notice of Appeal confers upon the Board jurisdiction. It is to be noted first that the Board's regulation EBR-§3-05 concerns itself with the form which the contents of the Notice of Appeal are to be arranged, insofar as this regulation does anything more than restate the pertinent requirements of sec. 3745.04 of the Revised Code. As a result, an order, such as the one the Board issued on July 22, 1974 in relation to the initial Notice of Appeal, does not touch upon the jurisdictional predicate which must be present for any appeal to this Board if the Board is to conclude they have jurisdiction. The compliance by the Appellant with the Board's order of July 22, 1974,

therefore, does not preclude the duty of the Board to consider their jurisdiction in this appeal. Any different conclusion would impose upon the Board, at a point in the proceedings when they are concerned with fulfilling the proprieties of administrative pleading, the duty to make, *sua sponte*, perhaps crucial jurisdictional decisions without assistance from counsel.

The jurisdictional problem, as it relates to the Notice of Appeal, is rooted in the language of sec. 3745.04 of the Revised Code. That language provides in pertinent part:

> "The appeal shall be in writing and shall set forth the action complained of and the grounds upon which the appeal is based."

The Board in their regulation EBR-§3-05, based upon this statutory provision, have provided in pertinent part the following:

> "(A) The Appeal shall * * * set forth * * * a specification of objections setting forth the manner in which Appellant is aggrieved by such action and the relevant issues to be resolved by the Board.
>
> (B) The Notice of Appeal shall contain the assignments of error to be presented for review. It shall state in numbered paragraphs why the appeal is being taken, what action occurred which led to the taking of the appeal, the facts essential for review, and the relief sought on appeal."

The language in sec. 3745.04 is very close to the language which the Ohio Supreme Court had before them in *American Restaurant & Lunch Co. v. Glander*, 147 O.S. 147, 70 N.E. 2d 93 (1946). Instead of a requirement for appellants to "set forth the action complained of and the grounds upon which the appeal is based", that statute required "that such notice of appeal *shall set forth* or *shall have attached thereto*, and incorporated therein by reference, a true copy of notice sent by the commissioner to the taxpayer of the final determination complained of and *shall* also specify the error or errors therein complained of", *Ibid.*, at p. 94, Court's emphasis. A failure to substantially comply with the requirements of this statutory language, which the Court concluded was specific and mandatory, constituted a failure to perform "a condition precedent to the enjoyment of the right of appeal conferred by the statute", *Ibid.*, p. 95. Such a condition precedent is a jurisdictional predicate to the authority of an administrative review tribunal to act.

It is true that the Ohio Supreme Court in more recent decisions has put great emphasis upon the concept of substantial compliance with the requirements of what is now sec. 5717.02 of the Revised Code. The Court seems not to accept the position that "an appellant must strictly pursue its mandatory requirements if he would confer jurisdiction upon the Board of Tax Appeals to review his cause", so long as there is in the Notice of Appeal an essential allegation of an action contrary to the law, a specification of the action which the Appellant questions, and an implicit assertion that the action was against the weight of the evidence, *Abex Corp. v. Kosydar*, 350 O.S. 2d 13, 298 N.E. 2d 584 (1973), at pp. 586-587. The Court has asserted that it is without "disposition to be hypertechnical and to deny the right of appeal on captious grounds", *Queen City Valve v. Peck*, 161 O.S. 579, 120 N.E. 2d 310 (1954).

Such a disposition must be at least as strong in an administrative review tribunal in light of oft-repeated assertions that the administrative process ought not to be cribbed about by hampering rules, see speech to the United

States Senate, June 4, 1963, of the late Sen. Everett Dirksen on the need for streamlined administrative procedures, reprinted in 24 *Administrative Law Review* (1972) 483, at p. 488. Yet even Senator Dirksen, though not addressing himself to any issue so fundamental as whether or not jurisdiction has been conferred on an administrative review tribunal by the content of the notice of appeal, notes, "* * * I have noticed that the burden of being specific has generally worked quite well in limiting the issues which lawyers raise on appeal to those which are material". This, however, relates to convenience rather than jurisdictional necessity.

It is to be noted that the Amended Notice of Appeal in this case explicitly avers only that the order of July 1, 1974 of the Director violates the constitution of Ohio. The "specific objections" are:

"1. Ohio Revised Code Section 6111.13 relating to the fluoridation of water supplies is not a general law within the meaning of Article XVIII, Section 3 of the Constitution of the State of Ohio and, therefore, the City of Canton has the right to determine whether to fluoridate its system.

2. Pursuant to Article XVIII, Section 4 of the Constitution of the State of Ohio, the water supply of the City of Canton, Ohio, is a public utility for which the power to operate said utility solely rests with the City of Canton.

3. The City of Canton, pursuant to its Home Rule process, has passed an ordinance, 265/72, stating that it does not desire to fluoridate its water.

4. The citizens of the City of Canton in the elections of November 3, 1959 and November 6, 1962 have stated that they do not want their water fluoridated."

The first two objections raise purely constitutional questions. This Board is barred from considering constitutional questions, *State ex rel. Park Investment Co. v. Board of Tax Appeals,* 32 O.S. 2d 28, 289 N.E. 2d 579, at 581 (1972), and *Mobil Oil Co. v. City of Rocky River et al.,* 38 O.S. 2d 23, at 26 (1974). Consequently, this Board could not consider the constitutional issues discussed in such cases as *State ex rel. Lehman v. Cmich,* 23 O.S. 2d 11, 260 N.E.2d 835 (1970) and *Alkire v. Cashman,* 35 O. Misc. 55, 530 Fed. Supp. 360 (So. D., Ohio, 1972); affd., 477 F. 2d 598 (6th Cir., 1973); cert. den., 414 U.S. 858 (1973).

This leaves the other two objections in the Notice of Appeal for this Board to consider. The only basis for this Board to vacate an order of the Director is to find his action to have been either unlawful, or unreasonable, or both; and this finding of the Board must be supported by substantial, reliable, and probative evidence, compare secs. 3745.05 and 3745.06 of the Revised Code. Counsel for the Appellant has stated that these two objections were meant to infer the order of July 1, 1974 of the Director was unlawful and/or unreasonable, Transcript, p. 13. This amounts to an assertion that it was unlawful and/or unreasonable for the Director to have issued his order in the face of the Canton ordinance 265/72 and of the local Canton elections concerning fluoridation.

Scant though this is, the Board is of the opinion that the Amended Notice of Appeal has sufficient statement within it to meet the requirement of sec. 3745.04 of the Revised Code capable of conferring jurisdiction upon this Board. The Amended Notice of Appeal opens with the statement, "Notice is hereby given that the City of Canton, Appellant, hereby appeals to the Environmental Board of Review, from the order of the Director of Environ-

mental Protection entered in this action on the 1st day of July, 1974, * * *". This is highly reminiscent of the fact situation in *Capital Loan & Savings Co. v. Biery,* 134 O.S. 333, 16 N.E. 2d 450 (1938), wherein the Notice of Appeal simply said, after a statement that the lower court had over-ruled a motion for a new trial, "* * * defendants hereby give notice of appeal". The Court found there had been actual notice and no prejudice or surprise since, "* * * there was only one judgment and only one court from which and to which an appeal could be taken", *Ibid.,* at p. 453. Considering the "exclusive original jurisdiction" conferred upon this Board under sec. 3745.04, it would appear that this rule would hold here, even though the case cited is not one in administrative law.

This Board cannot over-look the significance of the statutory assignment of responsibility to this Board through the use of the term "exclusive original jurisdiction". It has been described as a "broad power" in *Village of Ontario v. Whitman,* (Franklin County Court of Appeals, 73AP-203), p. 10, Slip Opinion, decision rendered August 21, 1973. Orders of the Director of Environmental Protection are reviewable by this Board, *Forest Hills Utility Co. v. Whitman,* (Franklin County Court of Appeals, 73AP-306), p. 2 of the Slip Opinion, decision rendered November 6, 1973; and this Board is obligated to move along to a speedy resolution all appeals taken to them. Furthermore, this Board is a necessary stage in the appellate review process provided in Chapter 3745 of the Revised Code; and the Board must be careful in any determination that there is no lack of jurisdiction in the Board because of failure in the statement of the grounds occurring in the Notice of Appeal. No Motion to Dismiss was filed in this appeal by the Director; but even in its absence, if the Board were convinced that the Amended Notice of Appeal here were defective in meeting the requirements

of sec. 3745.04 of the Revised Code, the Board should have to dismiss the appeal as constituting one over which the Board had no jurisdiction.

The Board, however, on a careful consideration of Chapter 3745 of the Revised Code, of the Appellant's Amended Notice of Appeal, and of the judicial authorities in Ohio read by the Board, is of the opinion that the Amended Notice of Appeal is sufficient under the statute to confer upon this Board jurisdiction to hear and decide the appeal.

III.

Having determined that they have jurisdiction, however, the Board must conclude that the legal issues raised in this appeal have been previously determined by the Board in their final orders in *City of Cincinnati v. Whitman,* Case No. EBR 73-23, decision rendered October 15, 1973, affirmed by the Court of Appeals of Hamilton County in *City of Cincinnati v. Whitman,* No. C-73531, decision rendered April 22, 1974, and *City of Dayton v. Whitman,* Case No. EBR 74-23, decision rendered August 6, 1974.

It is true that under former provisions of sec. 6111.13 that were effective between November 17, 1969 and March 22, 1973, the privilege of local initiative elections concerning fluoridation existed subject to a provision requiring petitions to be filed within a 120 day interval following November 17, 1969. This was a strictly phrased requirement that compelled all such elections to conform with sec. 3501.38 of the Revised Code and to be held within the time periods provided in the statute. No evidence was adduced in this case to show that the elections in the City of Canton, either that of November 3, 1959 or that of November 6, 1962, conformed with the requirements of sec. 3501.38; and

they certainly had not been held within the statutory time periods, nor had the statute any saving provision for elections held earlier. The facts themselves would render those elections as outside the scope of the provisions of sec. 6111.13 as it existed in the forty months between November 17, 1969 and March 22, 1973.

However, as we held in *City of Dayton v. Whitman, supra,* House Bill 1 as of March 23, 1973 eliminated all possibility of local initiative and local determination as to whether or not the public water supply would or would not be fluoridated, *Ibid.*, at p. 8. We can only repeat the language we used in that decision concerning the current condition of sec. 6111.13 of the Revised Code:

> "By that statute, except for public water supply systems serving fewer than five thousand persons, the requirement to fluoridate under the standards set forth by sec. 6111.13 of the Revised Code [was] made general and uniform throughout the state. All local initiatives, charters, ordinances, referenda or other legislative actions of municipal government conflicting with this statutory requirement became nugatory and unenforcible. As to the constitutionality of this action of the General Assembly, this Board does not, and cannot, have an opinion." *Ibid.*, at p. 9.

On May 31, 1972, the Ohio Director of Health by letter informed the City of Canton that it was not supplying fluoride to its public water supply as required by sec. 6111.13 (which he then had the responsibility for administering), Record of Proceedings, EBR 74-30(6)(II). This apparently led to the enactment by the City of Canton of its ordinance 265/72, see the documents in the Record of Proceedings EBR 74-30(6)(III) through (VIII).

On January 28, 1974 the Director of Environmental Protection received a petition from certain citizens and members of the Stark County and Canton Dental Societies alleging the City of Canton was in violation of sec. 6111.13 of the Revised Code, Record of Proceedings, EBR 74-30(6)(I), which the Director treated, lawfully and reasonably in our view, as a complaint under sec. 6111.12. This initiated the proceedings whose history is contained in the certified record which included the stipulation before Hearing Examiner Cotleur, see Record of Proceedings, EBR 74-30(3) for the stipulation, and *Ibid.*, EBR 74-30(2) for Mr. Cotleur's summarization of it. The stipulation established as a fact that the City of Canton was in violation of sec. 6111.13 of the Revised Code in that it had a public water supply system with a natural fluoride content of less than .8 milligrams per liter and that the City of Canton was refusing to add fluoride to the public water supply that would maintain a fluoride content of not less than .8 milligrams per liter of water nor more than 1.3 milligrams per liter of water.

As we observed in our decision in *City of Cincinnati v. Whitman, supra,* in the presence of undisputed facts such as these, the General Assembly had deprived the Director of issuing an order other than the one he issued on July 1, 1974, namely ordering "* * * the City of Canton to install and place in operation all devices necessary and appropriate to maintain the fluoride content of supplied water at the levels specified in Section 6111.13 of the Revised Code within thirty (30) days of this order".

On the basis of the certified record and the hearing held August 30, 1974 before this Board, this Board cannot find any evidence that the Director's action was in any way unlawful and/or unreasonable.

IV.

The Board, therefore, find and conclude that:

(1) the Amended Notice of Appeal stated the grounds of the appeal as required by sec. 3745.04 of the Revised Code with sufficient generality to establish the jurisdiction in this Board to hear this appeal;

(2) it was lawful and reasonable for the Director to treat the petition he received January 28, 1974 as a complaint within the meaning of Sec. 6111.12 of the Revised Code;

(3) the Director acted in both lawful and reasonable compliance with secs. 6111.12, 6111.13, 6111.18, 6111.19, as well as Chapter 3745, of the Revised Code;

(4) the Director was without discretion to perform any act other than ordering the fluoridation of the public water supply of the City of Canton in compliance with sec. 6111.13 of the Revised Code;

(5) the Director was not bound by the provision of ordinance 265/72 of the City of Canton since at least the effective date of March 22, 1973 of House Bill 1 amending sec. 6111.13 of the Revised Code; and

(6) the Director was in lawful and reasonable exercise of such discretionary authority as had been delegated to him under sec. 6111.13 and sec. 6111.19 when he left the discretion of the exact amount of fluoride to be added to the public water supply within the limits set by sec. 6111.13 of the Revised Code to the City of Canton.

The Board enter as their final order in this appeal, brought and heard under secs. 3745.04 and 3745.05 of the Revised Code, that the final order of the Director of Environmental Protection dated July 1, 1974 was in every respect a lawful and reasonable order and the Board, in accordance with sec. 3745.05 of the Revised Code, affirm the said order, and the stay granted by the Board on August 30, 1974 is hereby dissolved.

The Board, in accordance with sec. 3745.06 of the Revised Code and EBR-§7-01(A), inform the parties that:

> "Any party adversely affected by an order of the Environmental Board of Review may appeal to the Court of Appeals of Franklin County, or, if the appeal arises from an alleged violation of a law or regulation, to the court of appeals of the district in which the violation was alleged to have occurred. Any party desiring to so appeal shall file with the Board a Notice of Appeal designating the order appealed from. A copy of such notice shall also be filed by the Appellant with the court, and a copy shall be sent by certified mail to the Director of Environmental Protection. Such notices shall be filed and mailed within thirty days after the date upon which Appellant received notice from the Board by certified mail of the making of the order appealed from. No appeal bond shall be required to make an appeal effective."

The Environmental Board of Review

/s/ EARL FINBAR MURPHY
Earl Finbar Murphy, Chairman

/s/ STANLEY WEISSMAN
Stanley Weissman, Vice-Chairman

Entered in the Journal of the Board this 4th day of September, 1974.

OHIO REVISED CODE

6111.13 Control of public water supplies by department of health; fluoridation of water.

The department of health shall exercise general supervision of the operation and maintenance of the public water supply and water-works systems throughout the state. For the purposes of sections 6111.13 to 6111.17, inclusive, of the Revised Code, a public water supply and water-works system includes any such system publicly or privately owned which is of a public or quasi-public nature installed for a municipal corporation or part thereof, an unincorporated community, a county sewer district, or other land outside a municipal corporation, a state, county, district or municipal public institution, a privately owned institution, university, college, seminary or school, club, church, factory, or other place of employment, or other public, quasi-public, or privately owned institution, building, or place used for the assemblage or employment of persons. Such general supervision shall include all features of construction, operation and maintenance of systems for supply, treatment, storage, and distribution, which do or may affect the sanitary quality or fluoride content of the water supply.

If the natural fluoride content of supplied water of a public water supply and water-works system is less than eight-tenths milligrams per liter of water, fluoride shall be added to such water to maintain a fluoride content of not less than eight-tenths milligrams per liter of water nor more than one and three-tenths milligrams per liter of water beginning:

(A) On or before January 1, 1971, for a public water supply and water-works system supplying water to twenty thousand or more persons;

(B) On or before January 1, 1972, for a public water supply and water-works system supplying water to five thousand or more persons, but less than twenty thousand persons. A municipal corporation may request the department of health for reimbursement of the actual cost of acquiring and installing equipment, excluding chemicals added to the water supply, necessary for compliance with division (A) or (B) of this section. The director of health upon determination of the necessity of this cost for this purpose shall order the reimbursement of the municipal corporation for such costs, from funds available to the department.

Within one hundred twenty days after the effective date of this section a petition may be filed with the board of elections of a county containing a political subdivision served by a public water supply to which fluoride must be added under this section and where fluoride was not regularly added to such water supply prior to the filing of such petition, requesting that the issue of adding fluoride to this water supply be placed on the ballot at a special election in the political subdivisions of the county or adjoining counties served by the water supply, to be held on a date specified in the petition, not less than ninety nor more than one hundred twenty days after the date of filing the petition.

The petition shall meet the requirements of section 3501.38 of the Revised Code and, in addition, shall designate the political subdivisions in the county and adjoining counties served by the water supply and shall be signed by not less than ten per cent of the number of electors served

by the water supply of each political subdivision who voted for governor at the last preceding gubernatorial election. The board of elections shall place the issue on the ballot at the special election to be held in the political subdivisions served by the water supply.

If a water supply extends into more than one county, the board of elections of the county where the petitions are filed shall, within ten days after such filing, send notice of such filing to all other boards of elections of counties served by the water supply and shall furnish all ballots for the special election.

In political subdivisions where only a part of the electors are served by the water supply, only those electors shall be allowed to vote on the issue who sign forms provided by the board of elections stating that they are served by the water supply. The question of adding fluoride to the water supply shall be determined, at this election, by a majority vote of those voting on the issue.

The department shall investigate the public water supplies throughout the state as frequently as is deemed necessary by the department, and whenever requested to do so by the local health officials, and may adopt and enforce orders and regulations governing the construction, operation, and maintenance of such public water supply and water-works systems, and may require the submission of records of construction, operation, and maintenance, including plans and descriptions of existing works. When the department has required the submission of such records or information the public officials or person, firm, or corporation having the works in charge shall promptly comply with such request.

Supreme Court of the United States

October Term, 1975

No. 75-1316

NED E. WILLIAMS, Director of Environmental Protection,
State of Ohio,
Appellee,

vs.

CITY OF CANTON, OHIO,
Appellant.

ON APPEAL FROM THE SUPREME COURT
OF THE STATE OF OHIO

MOTION TO DISMISS

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Supreme Court of the United States

October Term, 1975

No. 75-1316

NED E. WILLIAMS, Director of Environmental Protection, State of Ohio,
Appellee,

vs.

CITY OF CANTON, OHIO,
Appellant.

ON APPEAL FROM THE SUPREME COURT OF THE STATE OF OHIO

MOTION TO DISMISS

The Appellee moves the Court pursuant to Supreme Court Rule 16(1)(b), to dismiss the appeal herein on the grounds that the federal questions sought to be reviewed were not properly raised in the state court proceedings and that this appeal does not present a substantial federal question.

ARGUMENT

I. The Federal Questions Sought to Be Reviewed Were Not Properly Raised in the State Court Proceedings.

The Appellant contends that jurisdiction lies in this Court on authority of 28 United States Code, Section 1257(2). That section provides that:

> Final judgments or decrees rendered by the highest court of a State in which a decision could be had, may be reviewed by the Supreme Court as follows:
>
> * * *
>
> (2) By appeal, where is drawn in question the validity of a statute of any state on the ground of its being repugnant to the Constitution, treaties or laws of the United States, and the decision is in favor of its validity.

An essential prerequisite of jurisdiction pursuant to this section is that a substantial federal question be properly raised in the state court proceedings. As stated in *Oxley Stave Co. v. Butler County,* 166 U.S. 648, 655 (1897), "the jurisdiction of this court to re-examine the final judgment of a state court cannot arise from mere inference, but only from averments so distinct and positive as to place it beyond questions that the party bringing a case here from such court intended to assert a federal right."

The Appellant has attempted, at pages 6 through 9 of its Jurisdictional Statement, to establish that the federal questions were properly raised below. However, the fact remains, as will be hereinafter demonstrated, that the Appellant failed to raise, in any fashion whatsoever, any federal question in either the Ohio Court of Appeals or the Ohio Supreme Court and further, that neither the Court of Appeals nor the Ohio Supreme Court relied upon, or even considered any federal question. The decisions of the Court of Appeals and of the Ohio Supreme Court were based solely upon consideration of Ohio general law and of the Ohio Constitution.

Appellant first claims that a federal question was raised in the state proceedings by its Notice of Appeal to the Ohio Court of Appeals, which challenged the decision of the Ohio Environmental Board of Review as being, "unlawful, unreasonable, void and contrary to the laws and constitution of the State of Ohio and of the United States." This Court has held many times that a mere reference to the "Constitution and laws of the United States" is insufficient to properly raise a federal question. *Herndon v. Georgia,* 295 U.S. 441, 442-3 (1935); *Harding v. Illinois,* 196 U.S. 78, 88 (1904); *Capital City Dairy Co. v. Ohio,* 183 U.S. 238, 248 (1902); *Oxley Stave Co. v. Butler County,* 166 U.S. 648 (1897).

Appellant next claims that a federal question was raised in the Ohio Court of Appeals. No claim could be more inaccurate. An examination of Appellant's brief in the Court of Appeals discloses that Appellant assigned two errors, both of which were questions of Ohio constitutional law (App., p. A7). Furthermore, Appellant's Table of Authorities in that brief cites not a single federal statute or federal constitutional provision (App., p. A7).

Appellant next asserts, at page 7 of the Jurisdictional Statement, that the Ohio Court of Appeals "based its decision upon other broad federal constitutional principles. . . ." Appellant goes on to allege that the court states the pivotal question "in the language of federal due process

analysis," citing a passage from the decision of the Court of Appeals which does not mention due process, the Fifth Amendment, the Fourteenth Amendment or any other federal statute or constitutional provision.

Not surprisingly, the Appellant fails to call the Court's attention to that portion of the Ohio Court of Appeals decision which appears at page A22 of the Jurisdictional Statement. There the Court of Appeals sets out in numbered paragraphs the legal issues presented by this case. Then, the court makes the following statement:

> The sole assignment of error is that the order appealed from is contrary to law by reason of Ohio Constitutional infirmity. *No federal claim has been made.* (Emphasis added.)

Therefore, Appellant's contention that the Ohio Court of Appeals based its decision on federal grounds is specifically contradicted by that court's opinion.

Appellant next contends that a federal question was properly raised in the Ohio Supreme Court and, in fact, that the federal issues were the essential issues upon which the court's decision was based (Jurisdictional Statement, p. 9). Again, Appellant cites passages from the court's decision which makes no mention of any particular federal statute or constitutional provision. In fact, it is clear from the context that the court was referring to Ohio law rather than to federal law.

An examination of the Brief of Appellee filed in the Ohio Supreme Court once again discloses that the Appellant failed to raise any federal question before that court. The Propositions of Law make no mention of federal law and the Table of Authorities includes no citation to any federal statute or federal constitutional provision (App., pp. A8-A13).

Furthermore, the decision of the Ohio Supreme Court in this case was based exclusively on Ohio law. (See the Syllabi of the Opinion of the Ohio Supreme Court, p. A2 of the Jurisdictional Statement.)

II. This Appeal Does Not Present a Substantial Federal Question.

Appellant's primary argument, as set forth in the Jurisdictional Statement, is that Section 6111.13 of the Ohio Revised Code violates the due process clause of the United States Constitution. However, the courts of this country, both state and federal, have held with virtual unanimity that the fluoridation of public water systems does not violate the due process clause, or constitutional rights incorporated by that clause of the Fourteenth Amendment to the United States Constitution. See *Kraus v. City of Cleveland*, 163 Ohio St. 559, 127 N.E.2d 609, *appeal dismissed for want of a substantial federal question*, 351 U.S. 935 (1956); *Alkire v. Cashman*, 477 F.2d 598 (6th Cir. 1973), *cert. den.*, 414 U.S. 858 (1973); *Crawford v. City of Detroit*, 389 F.2d 1001 (6th Cir. 1968); *Chapman v. City of Shreveport*, 225 La. 859, 74 So. 2d 142, *appeal dismissed for want of a substantial federal question*, 348 U.S. 892 (1954); *Readey v. St. Louis County Water Co.*, 352 S.W.2d 622 (Mo. 1961); *Dowell v. City of Tulsa*, 273 P.2d 859 (Okl. 1954), *cert. denied*, 348 U.S. 912 (1955); also see, *Opinion of Justices*, 243 A.2d 716 (Del. 1968); *Schuringa v. Chicago*, 30 Ill. 2d 504, 198 N.E.2d 326 (1966); *Miller v. Evansville*, 247 Ind. 563, 219 N.E.2d 900 (1966); *Baer v. Bend*, 206 Or. 221, 292 P.2d 134 (1956); *Birnel v. Fircrest*, 53 Wash. 2d 830, 335 P.2d 819 (1959).

Appellant further contends that Section 6111.13 of the Ohio Revised Code violates the equal protection clause of the United States Constitution. That precise question

was presented and decided adversely to Appellant in *Alkire v. Cashman*, 350 F. Supp. 360 (D.C. Ohio, 1972), *aff'd.*, 477 F.2d 598 (6th Cir. 1973), *cert. den.*, 414 U.S. 858 (1973).

The authorities cited amply demonstrate that this appeal does not present a substantial federal question.

CONCLUSION

Wherefore, Appellee respectfully submits that the Appellant has failed to properly raise any federal question in the proceedings below. Furthermore, the decisions of both the Ohio Court of Appeals and the Ohio Supreme Court were based exclusively upon considerations of Ohio law. Appellee further submits, on the basis of the foregoing authority, that this appeal does not present a substantial federal question.

Therefore, pursuant to 28 U.S.C. Section 1257(2) and United States Supreme Court Rule 16(1)(b), the Appellee respectfully moves this Honorable Court to dismiss this appeal.

Respectfully submitted,

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APPENDIX

EXCERPT FROM BRIEF OF APPELLANT IN THE COURT OF APPEALS

(Case No. CA 4116, City of Canton, Plaintiff-Appellant vs. Ira L. Whitman, etc., Defendant-Appellee)

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Supreme Court of the United States

October Term, 1975
No. 75-1316

IRA L. WHITMAN, Director of Environmental Protection, State of Ohio,
Appellee,

vs.

CITY OF CANTON, OHIO,
Appellant.

ON APPEAL FROM THE SUPREME COURT OF THE STATE OF OHIO

APPELLANT'S REPLY TO MOTION TO DISMISS

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vs.

CITY OF CANTON, OHIO,
Appellant.

ON APPEAL FROM THE SUPREME COURT
OF THE STATE OF OHIO

APPELLANT'S REPLY TO MOTION TO DISMISS

The Appellee, Director of Environmental Protection of the State of Ohio, in his Motion to Dismiss, contends that no federal questions were properly raised by the City of Canton in the courts below, and that, since the Appellant's briefs in the Court of Appeals and the Supreme Court of Ohio did not specifically assign as error the violation of particular federal constitutional provisions, and since the Court of Appeals and Supreme Court in their respective opinions did not refer to specific federal constitutional provisions, the issue of whether federal questions were in fact raised, considered and determined in this case is foreclosed from further examination. The Appellant, City of Canton, disagrees with this proposition.

Several United States Supreme Court decisions have held that, if it appeared from the record including the opinions of the courts below, that federal questions were in fact considered and determined by the state courts, the establishment of how, when and by whom the federal ques-

tions were raised becomes unnecessary to the decision whether to accept jurisdiction. As stated in the case of *Charleston Federal Savings & Loan Association v. George T. Alderson,* 324 U.S. 182 (1944):

> "Where it appears from the opinion of the state court of last resort that a state statute was drawn in question, as repugnant to the Constitution, and that the decision of the Court was in favor of its validity, we have jurisdiction on appeal. For we need not inquire how and when the question of validity of the statute was raised when such question appeared to have been actually considered and decided by that Court."

The case of *Tilt v. Kelsey,* 202 U.S. 43, 51 (1907) further held that where the issue decided in a State court was clearly a federal question, the fact that the State court below did not specifically mention the federal constitutional provisions relied upon, would not prohibit review by the United States Supreme Court. In so ruling, the Court stated in part as follows:

> "Where judicial proceedings in one state are relied upon as a defense to an assessment by the authorities of another state, a right under the Constitution of the United States is specifically set up and claimed though it was not in terms stated to be such a right."

See also *New York v. Zimmerman,* 278 U.S. 63 (1928).

In the case herein on appeal, in spite of the remark in the opinion by the Court of Appeals, that ". . . no federal claim has been made", that court went on to decide that 6111.13 O.R.C. was invalid because the manner in which the law was applied bore no reasonable relationship to the purposes of such law. In view of the language used by the Court of Appeals, the appellant believes it can be fairly concluded that this case was decided in the Court

of Appeals in favor of the City of Canton upon federal substantive due process grounds.

It was from the above ruling of the Court of Appeals, holding that the local election provisions of 6111.13 O.R.C. were unreasonable and rendered the statute invalid, that an appeal was directly taken by the Ohio Director of Environmental Protection to the Ohio Supreme Court for review. In the Ohio Supreme Court, federal questions were brought before the Court for consideration by the Appellee who urged that fluoridation was a valid exercise of the State Police Power and supported this position by reliance upon a series of cases, the preponderance of which dealt with the question of whether various fluoridation laws violated federal due process requirements. It should be noted that in the Motion to Dismiss herein, the Appellee again cites a number of these same cases involving federal questions in support of the proposition that no federal questions were involved.

The Supreme Court of Ohio in its opinion as shown on page A12 of the Jurisdictional Statement specifically considered and overruled the holding of the Court of Appeals, that 6111.13 O.R.C. was void because the local option provisions were not reasonably related to the police power, and stated in part as follows:

> "For the reasons stated above, we disagree with the holding of the Court of Appeals that the inclusion by the General Assembly of local option provisions rendered the entire statute void because they were not reasonably related to the police power."

The Appellant, City of Canton, contends that in so reversing the Court of Appeals, the Supreme Court of Ohio clearly considered and determined a basic federal due process issue, irrespective of whether the Court specifically

cited provisions of the United States Constitution. The Appellant further urges that this was the primary issue decided by the Court of Appeals and reviewed and determined by the Ohio Supreme Court.

Further, in support of the Appellant's position that federal questions were raised, considered, and determined in the state courts below, the Appellant refers this Court to the first of the Syllabi preceding the opinion of the Ohio Supreme Court as shown at page A2 of the Jurisdictional Statement, where the Court states that its decision approves and expands the earlier decision in *Kraus v. City of Cleveland*, 163 Ohio St. 559 (1955). A review of that case reveals that it dealt with substantial federal constitutional questions concerning the validity of the Cleveland Fluoridation Ordinance as an exercise of the police power.

Lastly, the Appellant, City of Canton, contends that the matters presented by the City of Canton in its appeal herein, concerning the validity of 6111.13 O.R.C., and, in particular, the validity of the restrictive local option provisions contained in such statute, involve important federal questions worthy of review by this Court.

For the foregoing reasons the Appellant, City of Canton, respectfully urges that the Appellee's Motion to Dismiss be denied, and that jurisdiction be accepted over this appeal.

Respectfully submitted,

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